IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1771

WILLIAM COX and MARTHA COX,

Petitioners,

vs.

ST. JOSEPH'S HOSPITAL,
ERIC CASTELLUCCI, M.D.,
and EMERGENCY MEDICAL
ASSOCIATION OF FLORIDA, LLC,

Respondents.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

PETITIONERS' REPLY BRIEF ON THE MERITS

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I. ARGUMENT

A. The issue on review.

Before we address the particulars of the defendants' prolix responses, we have two general observations to make. First, we are constrained to point out that -- with the exception of the defendants' reliance upon the now thoroughly discredited decision in *Ewing v. Sellinger*, 758 So.2d 1196 (Fla. 4th DCA 2000) -- the motions for directed verdict that the defendants made below did not assert the grounds which the defendants have argued at considerable length here. Neither did the motions assert the grounds upon which the district court bottomed its reversal of the Coxes' judgment.

We remind the Court that the defendants did not object to the qualifications of Dr. Futrell and Dr. Berges to give expert opinion testimony on the issue of causation, and they did not object to the opinions themselves, much less on the grounds that their opinions should be excluded from evidence as "speculative" or "unsupported by sufficient facts." The Court will find the motions for directed verdict made at the close of the evidence below at T12: 1960-63. For the convenience of the Court, we have included the motions in an appendix to this brief.

Dr. Castellucci's counsel asserted two grounds. Relying upon *Ewing v. Sellinger, supra*, he argued that, because Dr. Berges testified that he would not have given tPA to Mr. Cox if he had known that he had suffered a prior subdural hematoma, the plaintiffs could not prove causation. Relying upon *Gooding v. University Hospital Building, Inc.*, 445 So.2d 1015 (Fla. 1984), he also mischaracterized Dr. Futrell's testimony, arguing that she had only given Mr. Cox a 46% chance of a better outcome.

The hospital's counsel simply "adopted" these arguments and added that there was no evidence that the failure to give tPA to Mr. Cox was a departure from the standard of care. At no time before verdict did the defendants ever complain that the plaintiffs' experts' opinions were "speculative" and "unsupported by sufficient facts." And as our initial brief explains in some detail, the trial court properly denied these motions, such as they were.

Because the defendants' motions for directed verdict did not challenge the plaintiffs' experts' opinions as "speculative" and "unsupported by sufficient facts," those grounds were not preserved for appellate review:

> The appellant's primary point concerning the insufficiency of the evidence is raised, as indeed it must be, on the basis of the alleged error of the trial court in denying his motion for directed verdict at the conclusion of all of the evidence. . . . Florida Rule of Civil Procedure 1.480(a) mandatorily requires that such "[a] motion for directed verdict shall state the specific grounds therefor." In this case, the only grounds asserted below were those we have already rejected . . . . None concern the present claims that the cause of action itself does not lie on these facts . . . . Accordingly, the defendant is precluded from raising them on appeal. As is said in 9C Wright And Miller, Federal Practice and Procedure §2533 (1971), in discussing an identical provision of Federal Rule of Civil Procedure 50, the "[s]tatment of one ground precludes a party from claiming later that the motion should have been granted on a different ground."

Wagner v. Nottingham Associates, 464 So.2d 166, 169 (Fla. 3d DCA 1985). *Accord Houghton v. Bond*, 680 So.2d 514, 522 (Fla. 1st DCA 1996) ("[A] party cannot seek judgment in accordance with a previously-made motion for directed verdict unless that

party has actually asserted the grounds raised in the motion for directed verdict made at the conclusion of the evidence in the case"). *See Prime Motor Inns, Inc. v. Waltman*, 480 So.2d 88, 90 (Fla. 1985); *6551 Collins Avenue Corp. v. Millen*, 104 So.2d 337 (Fla. 1958).

In short, the district court reversed the plaintiffs' judgment on grounds that were not preserved for appellate review. That was legally impermissible. *See Aills v. Boemi*, Case No. SC08-2087 (Fla. Feb. 25, 2010). It is too late for us to convince the district court of that, of course, but at the very least, the fact that these grounds were not preserved for appellate review should preclude the defendants from relying upon them here. Nevertheless, we will address them briefly in the limited space available to us, at a later point in the brief.

As our second general observation, we note that no matter how many times this Court has announced that the facts in any given case must be stated in a light most favorable to the verdict, with all conflicts resolved and all reasonable inferences drawn in favor of the verdict, litigants who have suffered an adverse verdict at trial and whose position on the legal issues is weak cannot resist restating the facts in a light most favorable to themselves in an appellate court. And that is what the defendants have done here.

They have reargued the version of the facts that the jury squarely rejected below, at extensive length, and simply ignored the version of the facts that the jury accepted when it returned its verdict in favor of the plaintiffs. While that tactic appears to have worked in the district court, we respectfully submit that it is a disservice to this Court

and should not be countenanced here. Unfortunately, space does not permit a detailed refutation of the version of the facts advanced by the defendants in their prolix briefs. It is worth reminding the Court, however, that it was *not* "undisputed" that Mr. Cox had suffered a subdural hematoma 2½ years earlier, as the defendants assert as the fulcrum upon which their entire argument turns.

To begin with, the report of a CT scan taken six weeks after the earlier incident found no evidence of a subdural hematoma (T. 1053, 1633, 1643-44, 1649). And Dr. Futrell, an undeniably accomplished expert in the analysis of brain scan imagery, testified that the CT scan taken in the hospital showed no evidence that Mr. Cox had ever had a significant subdural hematoma -- nothing, no sign of any damage in his brain whatsoever -- nothing that would relate to any risk of administering tPA (T. 1054-60). Dr. Berges also had the benefit of the CT scan when he determined initially that Mr. Cox was an appropriate candidate for tPA treatment. The jury was therefore entitled to find that Mr. Cox had *not* suffered a prior subdural hematoma that would have increased the risk of the tPA treatment he deserved. Most respectfully, the facts are stated in the proper light in our initial brief, replete with copious record references supporting them, and we refer the Court to *that* version of the facts to set the record straight.

We turn now to the particulars of the defendants' arguments. First, although the district court was not persuaded by it, we will address the one ground reargued here that was preserved for review in the defendants' motions for directed verdict -- their contention that, because Dr. Berges recanted his initial opinion and testified that he

would not have given tPA to Mr. Cox if he had known he had suffered a prior subdural hematoma, the plaintiffs could not prove the element of proximate causation. There are ready answers to this three-"ifs"-and-a-"maybe" defense, as we explained at length in our initial brief. But even if it were "undisputed" that Mr. Cox had a prior subdural hematoma, and even if Dr. Berges' recantation were the only opinion on the issue, the defendants' argument depends entirely on the now thoroughly discredited decision in *Ewing v. Sellinger*, 758 So.2d 1196 (Fla. 4th DCA 2000).

In that case, the district court concluded that the negligence of a physician in failing to call in a specialist to perform a C-section was not the proximate cause of damage to the plaintiff and her child because the on-call specialist testified that, had he been called, he would not have performed a C-section. At least one member of the *Ewing* panel has subsequently expressed serious doubts about the correctness of the decision -- in *McKeithan v. HCA Health Services of Fla., Inc.*, 879 So.2d 47, 49 (Fla. 4th DCA 2004) -- and it has been roundly and soundly rejected by every other district court that has considered it in similar contexts.

The initial challenge to *Ewing* came in *Munoz v. South Miami Hospital, Inc.*, 764 So.2d 854, 857 (Fla. 3d DCA 2000):

> . . . [I]t is not for the defendants, who putatively violated their standard of care by failing to warn, to argue that their not doing so had no effect on the situation, when their doing the appropriate thing would have removed all doubt. As was said in *Seley v. G.D. Searle & Co.*:
>
> > [O]nly speculation can support the assumption that an adequate warning, properly com-

> municated, would not have influenced the course of conduct adopted by a physician, even where the physician has previously received the information contained therein. "What the doctor might or might not have done had he been adequately warned is not an element plaintiff must prove as a part of her case."
>
> [Citations omitted].
>
> In an even broader context, we believe that this situation may be viewed as one in which (a) Dr. Litt and the nurses stood on professional ceremony by failing to tell their fellow healthcare provider of what they knew he needed to know but was ignoring, with the result that the child was terribly harmed and (b) Dr. Ugalde, perhaps out of a sense of guilt, of denial, or both, determined to let his fellow professionals off the hook by shouldering the entire responsibility for the devastating result himself. The determination of whether any of these perfectly permissible conclusions is accurately drawn from the circumstances is, however, not the job of judges. We can think of no case which more obviously invokes the rule that the resolution of issues of negligence and causation, in the light of all the circumstances, are what jury trials . . . are for.

Munoz was followed in *Sta-Rite Industries, Inc. v. Levey*, 909 So.2d 901, 905-06 (Fla. 3d DCA 2005):

> As we have previously held in *Munoz* . . . , one who does not warn with the urgency and intensity deemed required under the circumstances cannot say that failure would have made no difference. . . . This is the case even when, as in *Munoz*, the person to be warned -- there, a physician who should have been informed by hospital employees of his newborn patient's dangerous condition -- specifically claims that such a warning would not have affected his conduct.

The Fifth District has also rejected the conclusion in *Ewing*. Quoting *Munoz* at length in *Goolsby v. Qazi*, 847 So.2d 1001, 1003 (Fla. 5th DCA 2003), the Fifth District wrote, "We disagree with *Ewing* if it means that the negligent failure to diagnose a condition cannot be the cause of damages if a subsequent treater testifies that he would have shrugged off the correct diagnosis." And quoting again at length from *Munoz* in *Vucinich v. Ross*, 893 So.2d 690 (Fla. 5th DCA 2005), the Fifth District wrote, "In *Goolsby* . . . we stated that we agreed with the majority in *Munoz* . . . , which stated that a defendant cannot claim the defendant's failure to warn had no effect on the outcome when, if the defendant had made the proper warning, we would know for sure whether the outcome would have been affected." Most respectfully, *Ewing* is poor authority for the defendants' claim of entitlement to a directed verdict on the issue of proximate causation, especially when their reliance upon it depends entirely upon a jury finding that Mr. Cox did suffer a prior subdural hematoma and upon the jury's acceptance thereafter of their speculative three-"ifs"-and-a-"maybe" defense.

We turn now to the defendants' insistence that the district court was correct in concluding that the plaintiffs' experts' opinions were "speculative" and "unsupported by sufficient facts." Dr. Castellucci begins his argument by contending that the opinions of "professional expert witnesses," so-called "hired guns," cannot be trusted and that courts should therefore be extremely dubious about them. Of course, Dr. Berges does not fall into this category, and because he was the on-call neurologist who would have treated Mr. Cox with tPA had he been called in time, his initial opinion was entitled to

considerable respect by the courts.

And with respect to Dr. Futrell, the argument is silly. The legislature has *required* the use of professional expert opinion witnesses as a pre-condition to even bringing a medical malpractice suit. Section 766.203, Fla. Stat. And because lay jurors and judges lack the expertise to decide issues of medical malpractice, this Court has *required* the use of professional expert opinion witnesses to prove a *prima facie* case of liability. *Atkins v. Humes*, 110 So.2d 663 (Fla. 1959). Having *mandated* that professional expert opinion witnesses are absolutely necessary in cases like this one, the Court simply cannot dismiss them out-of-hand, as the district court did, simply because the witnesses were paid for their time. *See Cromarty v. Ford Motor Co.*, 341 So.2d 507, 509 (Fla. 1976) ("We are of the view that expert opinions, when supported by scientific and factual data, must be relied upon in reaching the ends of justice and that the need for such reliance continues as a society becomes more complex").

Besides, the defendants hired their own professional expert witnesses in this case. Should their opinions have been dismissed out-of-hand as well? Certainly not. Indeed, it is likely that the jury factored their testimony into its determination of the facts, because much of it was helpful to the plaintiffs. For example, Dr. Castellucci conceded that the FDA's "contraindications," which the defendants have insisted here were "absolute," were merely "guidelines," not "mandates" (T. 559). The defendants' "stroke expert" also testified that the American Heart Association and the American Academy of Neurology did not treat the "contraindications" as absolute, but merely as risks that must be weighed against the potential benefits (T. 1810-11).

Moreover, both Dr. Castellucci and the defendants' stroke expert agreed with Dr. Futrell that Mr. Cox had a normal CT scan that did not exclude him from the use of tPA (T. 528, 1826). It is also noteworthy, we think, that the defendants' stroke expert did *not* offer an opinion that *Mr. Cox* would not have benefitted from tPA; all that he said was that it is impossible to reliably predict how a single patient is going to respond to the treatment, and more than 50% do not respond (T. 1800). That mere generality did *not* contradict Dr. Futrell's testimony about the *specific* fact at issue in this case, whether *Mr. Cox* would have benefitted from tPA treatment, in any way.

In any event, Dr. Futrell's opinion testimony was not "speculative" and "unsupported by sufficient facts." It was not mere "*ipse dixit*" as the hospital contends. And Dr. Futrell most certainly did not say, "It is so because I think it is so" or give a "bare opinion," as Dr. Castellucci contends. We agree with Dr. Castellucci that, if Dr. Futrell had opined that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system, her opinion could properly be disregarded here. But that is clearly not this case -- and Dr. Futrell deserved far more respect than either the defendants' counsel or the district court has shown to her.

Dr. Futrell had impeccable credentials, and it would be difficult to find a more qualified expert in the treatment of stroke victims. She had extensive clinical experience and, because of her extensive experience on the editorial boards of a number of neurological journals, she was intimately familiar with the medical literature on the subject. The defendants complain that the "literature" (i. e., the one decade-old study upon which they rely) did not support her opinion, but when Dr. Futrell began to

discuss a subsequent Canadian study done by Alastair Bookman that *did* support her opinion, the defendants objected and she was prohibited from further discussion of the literature (T. 1077-78). Most respectfully, the defendants cannot have it both ways. They cannot use a sword at trial to prohibit Dr. Futrell from discussing the literature that supported her opinion, and then shield themselves from liability on appeal on the ground that Dr. Futrell did not disclose the literature that supported her opinion. The appellate process cannot permit such gamesmanship.

And no legitimate argument can be made that the opinions of Dr. Futrell and Dr. Berges were "unsupported by sufficient facts." When a stroke victim enters an emergency room, a series of tests are run on the victim's brain and vascular system -- tests which are specifically designed to determine whether the victim is an appropriate candidate who will likely benefit from tPA therapy. Both Dr. Futrell and Dr. Berges had the benefit of all these test results, including the most important one -- the "supernormal" CT scan taken of Mr. Cox's brain. If the results of these tests provided sufficient facts for the treating physicians to make a determination whether Mr. Cox would likely benefit from tPA therapy, then they certainly provided sufficient facts from which the plaintiffs' expert witnesses could determine whether Mr. Cox would likely benefit from the therapy.

Indeed, it is difficult to imagine what other facts might be necessary to reach such an opinion -- and it is a certainty that the panel of judges that reversed the plaintiffs' judgment below were not qualified by any medical training to determine what other facts would be necessary to reach such a conclusion. Most respectfully, the

plaintiffs' experts' causation opinions were *not* "speculative," and they were *not* "unsupported by sufficient facts." They were squarely bottomed on the very facts that Dr. Castellucci gathered to determine whether Mr. Cox was an appropriate candidate who would likely benefit from tPA therapy -- and the only reason he did not receive the therapy he deserved was that, although the information was readily available, no one bothered to determine the time of onset of his stroke.

Some miscellaneous arguments deserve to be addressed, if only briefly. The hospital has collected a handful of cases from "other jurisdictions," claiming that they are dispositive of the issue presented here. They are not. In *Young v. Memorial Hermann Hospital System*, 573 F.3d 233 (5th Cir. 2009), the Court affirmed a summary judgment for the defendant hospital where the plaintiffs' expert relied *exclusively* on the NINDS study for his causation opinion; the court concluded simply that the numbers in the NINDS study did not support a finding of "more likely than not" causation. In *Ensink v. Mecosta County General Hospital*, 262 Mich. App. 518, 687 N.W.2d 143 (2004) -- a decision by an intermediate appellate court, not the Michigan Supreme Court, as the hospital has represented in its brief -- the panel found the plaintiffs' experts' causation opinion sufficient to support a finding of causation, but because it was bound to follow a prior decision of the same court that required a different mathematical computation, it affirmed a summary judgment for the defendants. Since the panel disagreed with that prior decision, it is poor authority for the defendants' position here.

Flanagan v. Catskill Regional Medical Center, 65 A.D.3d 563, 884 N.Y.S.2d

131 (2009), is of no help to the defendants at all. It affirms a summary judgment for the defendants because the plaintiffs' experts' opinion on the issue of *negligence* was speculative; there is no mention of the causation issue in the decision. And the remainder of the decisions collected by the hospital say no more than what this Court has already said in *Gooding v. University Hospital Building, Inc.*, 445 So.2d 1015 (Fla. 1984) -- that a plaintiff cannot recover for the mere "loss of a chance," but must prove that a defendant's negligence "more likely than not" caused damage. And because the plaintiffs' experts provided the evidence in this case that was missing in *Gooding*, these "loss of a chance" decisions add nothing to the debate here.

The hospital has raised some additional arguments, contending that Dr. Futrell's causation opinion involved an impermissible "stacking of inferences," and that her opinion had to be "*Frye*-tested." We could ask the Court for leave to exceed the page limits of a reply brief to demonstrate that these contentions are frivolous, but the Court has enough to read -- and there is no need to do so. These arguments were not raised below, either in the trial court or in the district court, so we believe they can be safely ignored. Finally, the hospital contends that it was entitled to a directed verdict because the jury's verdict was "against the manifest weight of the evidence." This contention is wrong, of course. If the trial court had found the verdict to be against the manifest weight of the evidence -- and it did not -- the hospital would have been entitled only to a new trial -- not to a directed verdict.

B. The defendants' "cross-issues" on review.

Between the two of them, the defendants have raised *seven* "cross-issues." Since

there is no rule of appellate procedure providing for cross-review or a 50-page answer brief by a cross-respondent in this Court, it would appear that we are limited to the 15 pages allowed for a reply brief. Raising seven cross-issues on discretionary review in 100 pages of briefs is therefore obviously an unfair tactic. Fortunately, the hospital has not asked the Court to decide its five cross-issues, but merely to leave them open for determination on remand if the district court's decision is quashed, so we need not respond at length. If the Court is at all interested in reviewing them, it will find our responses to them at pages 22-40 of our appellees' brief in the district court, copies of which are included in an appendix to this brief for the convenience of the Court -- and which we incorporate here by reference as our responses on the merits. And we respectfully submit that an examination of our responses should convince the Court that there is no need to leave these issues open for determination on remand.

Unlike the hospital, Dr. Castellucci *has* asked the Court to reach and decide its two cross-issues. We respectfully submit that they are frivolous. His contention that a defendant can maintain an "empty chair" defense without the need to plead the negligence of the "empty chair" in an answer is belied by the plain language of the legislature's 1999 amendment to §768.81 in Ch. 99-225, Laws of Florida. The statute has, from that point forward stated: "In order to allocate any or *all* fault to a nonparty, a defendant must affirmatively plead the fault of a non-party . . . ." (emphasis supplied). §768.81(3)(d), Fla. Stat. (1999); §768.81(3)(a), Fla. Stat. (2007).

And his contention that trial court erred in declining to instruct the jury that negligence was no longer an issue in the case was clearly waived below when the trial

court told Dr. Castellucci's counsel he could tell the jury exactly that in closing argument and counsel replied, "I'm satisfied with that" (T. 1977). In any event, more elaborate responses to these two issues can be found at pages 40-47 of the appellees' brief we filed in the district court, copies of which are also provided in the appendix to this brief -- and which we incorporate here by reference as our responses on the merits.

II. CONCLUSION

It is respectfully submitted that the district court's decision should be quashed and the cause remanded with directions to affirm the plaintiffs' judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 1st day of April, 2010, to: Edward M. Copeland IV, Esq., Rissman, Weisberg, et al., One North Dale Mabry Highway, 11th Floor, Tampa, FL 33609, *Counsel for EMAF and Castellucci*; Roland J. Lamb, Esquire, Morgan, Lamb, Goldman & Valles, P.A., 500 North Westshore Blvd., Suite 820, Tampa, FL 33609, *Counsel for St. Joseph's Hospital*; Irene Porter, Esq., Hicks & Kneale, P.A., 799 Brickell Plaza, Ninth Floor, Miami, FL 33131; and to Kimberly A. Ashby, Esq., Akerman Senterfitt, 420 South Orange Avenue, Suite 1200 (32801), Post Office Box 231, Orlando, FL 32802, *Counsel for St. Joseph's Hospital*.

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